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OFFICE OF PETITIONS

In re Application of :
Douglas I. Lovison :
Application No. 09/877,577 :
Filed: June 7, 2001 :
Attorney Docket No. 189.11 :

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed February 16, 2005, to revive the above-identified application.

The petition is **dismissed**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)."

This application became abandoned for failure to timely reply to the non-final Office action mailed September 29, 2003. Accordingly, this application became abandoned on December 30, 2003. A Notice of Abandonment was mailed on May 4, 2004.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by:

- (1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) The petition fee as set forth in § 1.17(l);
- (3) A showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and

- (4) Any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section.

This petition lacks item (3) above.

Decisions on reviving abandoned applications on the basis of “unavoidable” delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word ‘unavoidable’ . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm’r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff’d, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm’r Pat. 139, 141 (1913). In addition, decisions on revival are made on a “case-by-case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was “unavoidable.” Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner asserts that the delay was caused by applicant’s previous attorney, Neil K. Nydegger. Petitioner states, “According to PTO records, the PTO mailed an Office Action to the Petitioner’s attorney of record, Neil K. Nydegger, on September 29, 2003. According to records received by Petitioner from Mr. Nydegger, Mr. Nydegger received the Office Action on October 2, 2003. . . . Mr. Nydegger did not inform the Petitioner that Mr. Nydegger had received the Office Action or that the Office Action had been mailed by the PTO or received by Mr. Nydegger. The Petitioner is not aware of any reply being filed to the Office Action. According to PTO records (Public PAIR), the Application was abandoned by the PTO on May 3, 2004 for Petitioner’s failure to reply to the Office Action.”

Petitioner’s statement indicates that Neil K. Nydegger was responsible for prosecution of the above-identified application when the reply necessary to avoid abandonment was due. Therefore, petitioner must provide a statement from Neil K. Nydegger explaining why action was not timely taken to prevent the above-identified application from becoming abandoned.

However, please note, the Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and petitioner is bound by the consequences of those actions or inactions. (Emphasis added). Link v. Wabash, 370 U.S. 626, 633-34 (1962); Huston v. Ladner, 973 F.2d 1564, 1567, 23 U.S.P.Q.2d 1910, 1913 (Fed.

Cir. 1992); see also Haines v. Quigg, 673 F. Supp. 314, 317, 5 U.S.P.Q.2d 1130, 1132 (D.N. Ind. 1987).

Accordingly, the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).

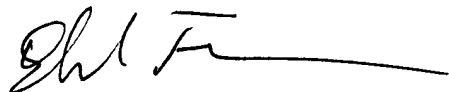
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
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 Alexandria, VA 22313

By FAX: (703) 872-9306
 Attn: Office of Petitions

By hand: Customer Service Window
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Telephone inquiries should be directed to the undersigned at (571) 272-3228.



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